Supreme Court of the United States

OCTOBER TERM, 1970

No. 1245

HAROLD K. BAKER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL MEMORANDUM

In our petition, we suggested that this case could be held pending the decision in *Nelson* v. *O'Neil,* No. 336, October Term, 1970, because affirmance there would have dictated summary reversal of this case. At the same time, we emphasized that if *Nelson* v. *O'Neil* were reversed, certiorari should nevertheless be granted here because of a vital distinction in this case. (Pet., pp. 22-23).

Our reference was to the denial of a limiting instruction protecting petitioner from the witness Roten's testimony concerning an extra-judicial confession by petitioner's co-defendant. (Pet., pp. 10-11, 13, 22-23). This critical distinction is conceded by the United States. Its Memorandum in Opposition states (pp. 2-3):

> "In his closing charge the trial judge refused to give a limiting instruction concerning Roten's testimony".

This was egregious error. The decisions of this Court, before and after *Bruton,* teach that two conditions are prerequisite to the admission of a codefendant's confession compatibly with the constitutional confrontation requirement, particularly in federal cases. They are: first, a limiting instruction confining the admissibility of the confession to the declarant; and second, the appearance of the confessing codefendant as a witness subject to effective cross-examination.

Such a limiting instruction is an *a priori* condition. Its observance was emphasized in all of the leading cases. The careful cautionary instructions were quoted *verbatim* both in *Bruton* v. *United States,* 391 U.S. 123, 125 n. 2 (1968) and *Delli Paoli* v. *United States,* 352 U.S. 232, 239-40 n. 6 (1956). In *Nelson* v. *O'Neil,* No. 336, October Term, 1970 (decided June 1, 1970)—a state case—the Court took pains to refer to the delivery of such an instruction both at the time the testimony was given and in the closing charge to the jury. (Slipsheet Opinion at 2, 4). It likewise referred to the limiting instruction in *Roberts* v. *Russell,* 392 U.S. 293, 294 (1968). Disinterested testimony of an extra-judicial confession by a codefendant cannot be overcome absent "a firm instruction to disregard it in determining the defendant's guilt or innocence." *Bruton* v. *United States, supra,* 391 U.S. at 141 (White, J. dissenting).

The vice of the refusal of a limiting instruction here was compounded by the instruction excluding the consideration against petitioner of the witness Skaggs' less prejudicial testimony concerning the codefendant's activities. (Pet., pp. 12-13, 17-18). This juxtaposition was tantamount to an instruction that the codefendant's confession was evidence against petitioner.

The resulting prejudice to petitioner was especially devastating because his codefendant's credibility, in denying the confession, collapsed during the prosecution's cross-examination. (Pet., pp. 12, 21). *Cf. California* v. *Green,* 399 U.S. 149, 168-69 (1970). There was no parallel here to *Nelson* v. *O'Neil, supra,* where the codefendant "stuck to his story in every particular" (*id.* at 2) and testified "at length and favorably to the defendant" (*id.* at 6).

Respectfully submitted,

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